No. 86 1551

In The

Supreme Court of the United States

October Term, 1986

NARCISO RAFAEL PEREZ DE LA CRUZ, et ano.,

Petitioners,

vs.

CROWLEY TOWING & TRANSPORTATION CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Did Congress—in amending 48 U.S.C. 749 in 1980—intend to extend Puerto Rico's three-mile territorial sea to three marine league (10.38 miles), thus enabling Puerto Rico to impose its Workmen's Compensation Act ("PRWACA") as the sole remedy for a seaman injured on a vessel six miles from Puerto Rico's coast?

2. Did the Circuit Court err when it construed 48 U.S.C. 749, as amended, as giving Puerto Rico a 10.38-mile territorial sea when there has been a unbroken national assertion of close to 200 years that we have only a three-mile territorial sea?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Narciso Rafael Perez De La Cruz and his wife, petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 18, 1986.

OPINIONS BELOW

1. First Circuit Court of Appeals Judgment and Opinion affirming District Court Opinion And Order dated and entered

December 18, 1986, is printed in the Appendix. It has not been officially reported as of this date.

2. District Court Opinion And Order dated February 16, 1986 is printed in the Appendix.

JURISDICTION

1. The Judgment of the United States Court of Appeals for the First Circuit was made, entered and filed on December 18, 1986.

2. This is an action by a seaman pursuant to 28 U.S.C. 1916 which provides for waiver of prepayment of fees and costs.

3. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

1. 48 U.S.C. 749, as amended; it is printed in the Appendix.

STATEMENT OF THE CASE

Petitioner ("Perez"), a seaman, was injured in 1983 while working aboard a vessel owned by respondent ("Crowley"). The accident occurred on a voyage from the Dominican Republic to Puerto Rico. Perez claimed that the accident took place when the ship was about 20-25 miles from Puerto Rico.[1] He filed suit for money damages relying on the Jones Act (46 U.S.C. 688), and the general maritime law.

After certain discovery, Crowley moved for summary judgment on conjunctive grounds: 1) the accident took place when

1. The issue as to where the accident took place is not appealed.

the ship was 6 miles from Puerto Rico's coast; and 2) Perez' sole remedy was PRWACA, 11 L.P.R.A. 1,19,21, because the March, 1980 amendment to 48 U.S.C. 749 had given Puerto Rico a 10.38-mile territorial sea.

The District Court went along with Crowley. The First Circuit affirmed, albeit with some restraint.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has decided a federal question which conflicts with national policies of close to 200 years.

2. The Circuit Court ignored long-standing judicial guidelines in arriving at its interpretation of the statute in question.

ARGUMENT

Point I

Our Three-Mile Territorial Sea

The three-mile territorial sea of the United States was first proclaimed by Secretary of State Jefferson in 1793. 1 J. Moore, *International Law Digest* 702 (1906). Congress adopted the three-mile limit in 1794 when it established the jurisdiction of the district courts. Act of June 5, 1794. And early on this Court recognized the sovereignty of the United States in this three-mile area. *Church v. Hubbart*, 2 Cranch (6 U.S.) 187,231.

This Court reaffirmed the three-mile territorial sea in 1923. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100,122 (1923). Forty-nine years later it was again stated that we had a three-mile territorial sea. U.S. Territorial Sea and Contiguous Zone, 37 Fed. Reg. 11906, June 15, 1972.

Puerto Rico recognized in 1956 that the three-mile territorial sea was applicable to it. Secretary of Justice Trias Monge (later Chief Justice of the Commonwealth Supreme Court) stated:

> In public international law, the United States always has sustained its rights of sovereignty in the coastal sea up to an extension of one marine league or rather three geographic miles. (See Hackworth, Digest of International Law, Vol. 1 p. 569). Being the coastal sea—in the case of Puerto Rico—under the dominion of the Commonwealth of Puerto Rico, obviously the authority of our government, in the measure in which Article 8 of the Federal Relations Act with Puerto Rico establishes it, shall extend itself to that limit. Opinions Vol. XXVII No. 12 p. 41 (1956).

And while other nations have opted for a larger territorial sea, 1982 *Convention On The Law Of The Sea,*[2] the United States has resisted following suit. R. Churchill and A. Lowe, *The International Law of the Sea* 61 (1983).

In a major ocean policy statement in 1983, President Reagan—speaking about the *Exclusive Economic Zone Of The United States,* No. 5030, 48 Fed. Reg. 10605, March 10, 1983—recognized the right of other countries to extend their territorial sea. However, the White House fact sheet accompanying this proclamation stated (in part): "The President has not changed the breadth of the United States territorial sea. It remains at three nautical miles." Puerto Rico was expressly mentioned in the latter vein together with the United States.

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2. The United States has never signed this Convention; it is still not in force due to a lack of signatories.

It is clear that from 1973 through date herein there has been an unbroken national assertion that the United States has a three-mile territorial sea.

By construing 48 *U.S.C.* 749, as amended, as giving Puerto Rico a 10.38 mile territorial sea, the lower courts have ignored our nation's long-standing declaration—especially in view of the fact that Congressional intent and executive-branch understanding of the amendment is contrary to that of the courts.

Point II

Congressional Intent

"Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Zenith Radio Corp. v. United States*, 437 U.S. 443,450 (1978). The Circuit Court expressly ignored your mandate.

Senate Hatfield—12 days prior to President Carter signing H.R. 3756 into law—told the Senate:

> There is another House Amendment which deserves special mention at this time—proposed section 607. This section... would convey from the United States to the territories certain oil, gas and mineral deposits in *submerged lands*... the general subject jurisdiction over *submerged lands* was raised this year during Senate markup of H.R. 3756... an amendment was adopted which would clarify or confirm the jurisdiction of Puerto Rico over its *submerged lands*. It was stressed in legislative history that the Senate intended to merely reaffirm existing policy relating to the jurisdiction of Puerto Rico over its *submerged lands* extending 3 leagues

> from shore. *Congressional Record*, February 28, 1980 at 2065. (emphasis supplied)

It could not be clearer what Puerto Rico was given.

Another example of Congressional intent is found in Senate Report 96-467:

> Section 606 clarifies Puerto Rico's jurisdiction over submerged lands within three marine leagues, and will not result in any additional expenditures by the federal government.
>
> ...
>
> the amendment merely confirms the action taken in 1917 by confirming the language of the 1917 Act to the language of the Submerged Lands Act and the Territorial Submerged Lands Act.

Legislative intent is patent: Puerto Rico was given the right to economically exploit the seabed and its natural resources up to 10.38 miles from its shoreline on a par with the Coastal States.

Where the Circuit Court erred was to equate economic exploitation of the continental shelf with sovereignty. Its judgment expressly acknowledged that it was at odds with Congressional intent.

Point III

Executive Understanding

Courts have the last word in construing a statute. *Japan Whaling Ass'n v. American Cetacean Soc.*, ___ U.S. ___, 106 S.Ct.

2860, 2866 (1986). Nevertheless, the "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with... construing the statute". *Zemel v. Rusk*, 381 U.S. 1,11 (1965); see also: *Chemical Mfrs. Ass'n v. Natural Res. Defense Coun.*, ___ U.S. ___, 105 S.Ct. 1102, 1108 (1985). The Circuit Court did not even give lip service to this.

When we signed the amendment into law, President Carter stated:

> I am pleased to sign H.R. 3756, a bill 'to authorize appropriations for certain insular areas of the United States, and for other purposes'.
>
> ...
>
> The bill also contains an important provision which confirms Puerto Rico's long-disputed ownership of *submerged lands,* including mineral rights, to a distance of three marine leagues (approximately 10 miles)... It establishes no precedent for the jurisdiction of States or other territories over *submerged lands.* (emphasis supplied)

See: Statement on Signing H.R. 3756 Into Law, 16 Weekley Comp. Pres. Doc. 466 (Mar. 12, 1980).

All nautical charts subsequent to the 1980 amendment still show Puerto Rico with a three-mile territorial sea.[3] These were prepared by a federal inter-agency committee charged with applying the principles of international law and deriving the limits of our maritime jurisdiction. *United States v. Maine*, ___ U.S. ___, 105 S.Ct. 992, 1003 n. 15 (1985).

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3. These are National Ocean Service charts #25671, 25677, 25650 and 25668.

CONCLUSION

Express Congressional intent and executive branch understanding of the amendment is unequivocable: Puerto Rico was given jurisdiction over submerged lands seaward to 10.38 miles. Its sovereignty over the waters extending that distance—so as to enable it to impose its laws on persons found within—was never considered or even contemplated.

This Court should grant the writ applied for. It would be in keeping with national policies of almost two hundred years.

Respectfully submitted,

HARRY A. EZRATTY
Attorney for Petitioners

APPENDIX A

§ 749. Harbors and navigable waters transferred

The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Porto Rico [Puerto Rico] and the adjacent islands and waters, now owned by the United States and not reserved by the United States for public purposes, be, and the same are hereby, placed under the control of the government of Porto Rico [Puerto Rico], to be administered in the same manner and subject to the same limitations as the property enumerated in the preceding section [48 USCS §§747, 748]: Provided, That all laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters: Provided further, That nothing in this Act contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers heretofore [prior to Mar. 2, 1917] lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of War or other authorized officer or agent of the United States. Notwithstanding any other provision of law, as used in this section (1) "submerged lands underlying navigable bodies of water" include lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide, all lands underlying the navigable bodies of water in and around the island of Puerto Rico and the adjacent islands, and all artificially made, filled in, or reclaimed lands which formerly were lands beneath navigable bodies of water (2) "navigable bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters" extend from the coastline of the island of Puerto Rico and the adjacent islands as heretofore or hereafter modified by

accretion, erosion, or reliction, seaward to a distance of three marine leagues; (3) "control" includes all right, title, and interest in and to and jurisdiction and authority over the submerged lands underlying the harbor areas and navigable streams and bodies of water in and around the island of Puerto Rico and the adjacent islands and waters, and the natural resources underlying such submerged lands and waters, and includes proprietary rights of ownership, and the rights of management, administration, leasing, use, and development of such natural resources and submerged lands beneath such waters.

(Mar. 2, 1917, ch 145, § 8 in part, 39 Stat. 954; Mar. 2, 1980, P. L. 96-205, Title VI, § 606(a), 94 Stat. 91.)

APPENDIX B

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1419

NARCISO RAFAEL PEREZ DE LA CRUZ, ET AL.,

Plaintiffs, Appellants,

v.

CROWLEY TOWING AND TRANSPORTATION COMPANY

Defendant, Appelle.

[Hon. Juan M. Perez-Gimenez, *U.S. District Judge*]

Before CAMPBELL, *Chief Judge,*
TIMBERS,* *Senior Circuit Judge*
and BREYER, Circuit Judge.

Philip E. Roberts with whom Harry A. Ezratty was on brief for appellants.

F. Henry Habicht, II, Assistant Attorney General, Daniel F. Lopez-Romo, United States Attorney, Jacques B. Gelin and Michael W. Reed, Departament of Justice, David A. Colson and

*Of the Second Circuit, sitting by designation.

Eugene M. Pinkelmann, Jr., Oceans International Environmental and Scientific Affairs, Departament of State, on brief for the United States, Amicus Curiae.

J. Ramon Rivera-Morales with whom William A. Graffam, David C. Indiano and Jimenez, Graffam & Lausell were on brief for appellee.

Rafael Ortiz-Carrion, Solicitor General, Norma Cotti-Cruz, Deputy Solicitor General, and Vannessa Ramirez, Assistant Solicitor General, on brief for the Commonwealth of Puerto Rico, Amicus Curiae.

Entered: December 18, 1986

TIMBERS, *Circuit Judge:*

Narciso Rafael Perez de la Cruz ("appellant") and his wife appeal from a summary judgment entered February 19, 1986 in the District of Puerto Rico, Juan M. Perez-Gimenez, *Chief Judge*, dismissing their complaint. The complaint alleged that appellee Crowley Towing & Transportation Company ("appellee") was liable under the Jones Act, 46 U.S.C. §688 (1982), for injuries sustained by appellant when he fell while on board appellee's tug. The court held that, because the tug was in Puerto Rico's local waters at the time of appellant's accident, his sole remedy was under the Puerto Rico Workmen's Accident Compensation Act ("PRWACA"), 11 L.P.R.A. §§1-42. On appeal, appellant argues that the court impermissibly resolved the disputed fact issue of the tug's location at the time of the accident. Appellant also argues that the court misinterpreted a 1980 amendment to the federal statute, 48 U.S.C. §749 (1982), which confers local maritime jurisdiction on the government of Puerto Rico. We hold that the court was correct in finding that there was no genuine issue of material fact as to the tug's

location at the time of the accident. We also hold that PRWACA provides the sole remedy for covered seamen who claim to have sustained injuries caused by their insured employers in accidents which occur within three marine leagues of the Puerto Rican coastline. We affirm.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Appellant is a resident of Puerto Rico and a merchant seaman. Appellee owns and operates out of San Juan harbor a tug named the Pawnee. Appellant has worked for appellee as an ordinary seaman and cook since 1977. It is undisputed that appellee is an insured employer under PRWACA and that appellant is a covered employee.

On September 19, 1983 appellant was serving as the "day man" on the Pawnee as it returned to San Juan harbor from the Dominican Republic. The day man's chief responsibility is to clean the tug. Sometime between 9:00 and 10:00 A.M. appellant slipped and fell on a ladder between the bridge and the deck. Appellant sustained injuries to his back and hand.

On April 17, 1984 appellant commenced the instant action in the district court. He alleged that under the Jones Act and general maritime law appellee was liable for appellant's injuries. He further alleged that appellee's negligent maintenance of the Pawnee had rendered the tug unseaworthy and caused his injuries. Appellee's answer denied these allegations and asserted as an affirmative defense the exclusive remedy provisions of PRWACA. *See* 11 L.P.R.A. §§19, 21.

On October 11, 1984 appellee moved for summary judgment. Appellee claimed that, because the tug was within Puerto Rico's local water at the time of the accident, PRWACA provided appelant's sole remedy. Appellee included with its motion an affidavit of the Pawnee's captain and the tug's log book for the day of the accident with an explanatory affidavit. The captain in his affidavit stated that, based on his navigational readings and radar plottings, the Pawnee was six miles from the Puerto Rican shore at 7:30 A.M. on the day of the accident and continued to move closer to shore throughout the morning, reaching a distance of four miles from shore by 11:00 A.M. The tug's log book also showed that it was six miles from shore at 7:30 A.M. and four miles from shore at 11:00 A.M. The explanatory affidavit, sworn to by another of appellee's captains, stated how the radar plottings were made and vouched for their accuracy. Appellee asserted that Puerto Rico's local waters extended for three marine leagues or 10.38 miles.

Appellant's opposition to summary judgment was two-pronged. First, appellant claimed that the tug was twenty to twenty-five miles off shore at the time of the accident and therefore outside of Puerto Rico's local waters. Appellant supported this contention with his own affidavit in which he stated that, based on his own observations, the Pawnee was twenty to twenty-five miles from shore at the time of the accident. Appellant argued that the tug's location at the time of the accident was a genuinely disputed material fact which precluded summary judgment. Second, appellant claimed that, even if the tug was between four and six miles from shore at the time of the accident, Puerto Rico's local waters extended to only three miles from shore.

In an opinion dated February 10, 1986 the court granted summary judgment in favor of appellee and dismissed the complaint. The court held that while the tug's location at the time of the accident was a material fact, there was no genuine issue as to that location in light of the parties' submissions. The court found that

appellant's vague and unsubstantiated personal observations as to the tug's location failed to overcome appellee's showing based on navigational charts and radar plottings. The court found that the tug was within six miles of Puerto Rico at the time of the accident.

As to the scope of Puerto Rico's local waters, the court held that Congress, in the 1980 amendment to Puerto Rico's Second Organic Act, 48 U.S.C. §749 (1982) ("§749"), extended Puerto Rico's maritime jurisdiction to the navigable waters within three marine leagues of the Puerto Rican coastline. Relying on the long established law of this Circuit, the court held that, since the accident occurred within this area of Puerto Rican maritime jurisdiction and since appellant's accident was covered under PRWACA, appellant's sole remedy was provided by PRWACA. The court dismissed the complaint. This appeal followed. The United States has submitted a brief as amicus curiae in opposition to the court's judgment. The Commonwealth of Puerto Rico has submitted a brief as amicus curiae in support of the court's judgment.

For the reasons stated below, we affirm the judgment dismissing the complaint.

II.

Appellant raises two arguments aimed at overturning the court's grant of summary judgment. First, he argues that the court erred in deciding the fact question of the tug's location at the time of the accident on a motion for summary judgment. Second, he argues that, even if the tug was only between four and six miles off shore at the time of the accident, the tug was still beyond Puerto Rico's maritime jurisdiction and therefore within the ambit of the Jones Act.

We need spent little time in disposing of appellant's first argument. The standards governing the award of summary

judgment are well settled and require little elaboration. While the burden is on the party seeking summary judgment to show that there are no genuine issues of material fact, the party opposing summary judgment "may not rest upon the mere allegations... of is pleading, but his response... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Supreme Court recently has defined a genuine issue as one in which the party opposing summary judgment provides evidence "such that a reasonably jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, U.S. , , 106 S. Ct. 2505, 2510 (1986). In the instant case, appellee more than satisfied its burden of showing that there was no genuine issue of material fact with respect to the tug's location at the time of the accident. Appellee's affidavits and log book entries, based on navigational charts and radar plottings, established that the tug was no more than six miles from the Puerto Rican coastline at the time of the accident. Appellant produced virtually no evidence to refute this showing. His only submission was his own affidavit in which he stated "I know from my past experience that I was approximately the distance from Puerto Rico that I allege in my deposition which was 20-25 miles." We agree with the district court that this bare allegation did not justify appellant's burden in resisting summary judgment. Appellee's submissions made it necessary for appellant to bring "significant probative evidence" to the district court's attention which would have tended to show a genuine dispute over the tug's location. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). Appellant's vague allegation based on his observations is composed of "the gossamer threads of whimsey, speculation and conjecture" which we have held insufficient to defeat a properly supported motion for summary judgment. *Manganaro v. Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962). We agree with the district court that, based on the parties' submissions, no reasonable jury could have found that the tug was twenty to twenty-five miles from shore at the time of the accident. We hold that the district court was correct in holding that there was

no genuine issue of material fact as to the tug's location and in finding that the tug was between four and six miles from the Puerto Rican coastline at the time of the accident.

Appellant's second argument requires a more extended discussion. The tug's location at the time of the accident is significant because of an unbroken line of cases dating back to 1924 in which this Court has held that Congress, §749 and its predecessors, gave Puerto Rico the power to supplant federal maritime law in favor of PRWACA for covered accidents involving seamen that occur in Puerto Rico's local waters. *E.g., Lastra v. New York & Porto Rico S.S. Co.*,2 F.2d 812 (1st Cir. 1924); *Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349 (1st Cir. 1956); *Fonseca v. Prann*, 282 F.2d 153 (1st Cir. 1960), *cert. denied*, 365 U.S. 860 (1961); *Alcoa Steamship Co. v. Perez Rodriguez*, 376 F.2d 35 (1st Cir.), *cert. denied*, 389 U.S. 905 (1967); *Mojica v. Puerto Rico Lighterage Col.*, 492 F.2d 904 (1st Cir. 1974); *Garcia v. Friesecke*, 597 F.2d 284 (1st Cir.), *cert. denied*, 444 U.S. 940 (1979); *Lusson v. Carter*, 704 F2d 646 (1st Cir. 1983). In *Lusson*, we held that, because of the power Congress delegated to Puerto Rico in §749, PRWACA displaces the Jones Act as the exclusive remedy for covered seamen injured by insured employers in Puerto Rican waters. *Lusson, supra*, 704 F.2d at 649. We also have held that Puerto Rico may not supplant the Jones Act with PRWACA for accidents occurring outside the boundaries imposed by §749. *Caceres v. San Juan Barge Co.*, 520 F.2d 305 (1st Cir. 1975).

Within this framework, the critical question is whether the tug here involved was in waters in which Congress has given Puerto Rico the power to supplant the Jones Act when the accident occurred. This question can be answered only by an examination of §749, the statute by which Congress delegated its local maritime jurisdiction to Puerto Rico.

Prior to 1980 §749 provided in relevant part:

> "The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico"

The statute was silent on the exact extent of the "navigable bodies of water" to which Puerto Rico was given "control". On March 12, 1980, however, Congress amended §749 by adding, among other things, a definition of "navigable bodies of water". That definition provides:

> " 'navigable bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters' extend from the coastline of Puerto Rico and the adjacent islands as heretofore or hereafter modified by accretion, erosion, or reliction, *seaward to a distance of three marine leagues*;"

(emphasis added). On its face the 1980 amendment to §749, in conjunction with our prior holdings regarding the effect of §749, appears to permit Puerto Rico to supplant the Jones Act with PRWACA for covered accidents to seamen that occur within three marine leagues or approximately 10.38 miles from the coastline of Puerto Rico.

Appellant argues, however, that Congress only intended the 1980 amendment to§749 to give Puerto Rico control over the submerged lands extending three marine leagues from its shores and not the waters above those lands. In part, this argument is based upon the statute's definition of "control," also added in 1980, as

> "includ[ing] all right, title, and interest in and to and jurisdiction and authority over the submerged lands underlying the harbor areas and navigable streams and bodies of water in an around the island of Puerto Rico and the adjacent islands and waters...."

On its face, however, this definition only clarifies that Puerto Rico's "control" includes authority over submerged lands, and does not limit it to those lands. Furthermore, if this definition were read as restricting Puerto Rico's authority to submerged lands, it would do so within (as well as outside) the three-mile zone within which we have long recognized the effect of PRWACA. Nothing in the legislative history suggests that Congress intended to overrule this line of decisions. While we agree that most of the legislative history concerning the amendment suggests that Congress' major purpose in amending §749 was to give Puerto Rico the same rights to undersea minerals as certain coastal states were given by the Submerged Lands Act, 43 U.S.C. §1301 (1953), the legislative history expresses no intent to limit the plain language of the amendment which gives Puerto Rico control over the navigable waters within three marine leagues of its coastline. *See* S. Rep. 467, 96th Cong., 1st Sess. 22 (1979). As we have indicated in our earlier cases construing the predecessors of §749, comparisons with the rights of coastal states are unavailing since the Supreme Court has held that Congress may not constitutionally delegate its maritime jurisdiction to the states. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917). We have held, however, that Congress may do just that in the case of Puerto Rico under the territories clause, U.S. Const. Art. IV, §3, cl.2. *Guerrido, supra,* 234 F.2d at 354-55. Congress therefore could not give the coastal states maritime jurisdiction in the Submerged Lands Act, but could and did give Puerto Rico that jurisdiction in §749.

We hold that the 1980 amendment to §749 permits Puerto Rico to supplant the Jones Act with PRWACA for covered accidents to

seamen which occur within three marine leagues of the Puerto Rican coastline.[1] Any other holding would overrule implicitly our prior decisions construing §749 and its predecessors. We decline to do so. Since it is undisputed that appellant is a covered employee and appellee is an insured employer under PRWACA, and we have held that the district court was correct in finding that the accident occurred within three marine leagues of the Puerto Rican coastline, we affirm the district court's dismissal of appellant's Jones Act complaint. PRWACA provides appellant the exclusive remedy. 11 L.P.R.A. §§19, 21. Congress, in enacting §749, has chosen to permit Puerto Rico to supplant the Jones Act by enacting inconsistent local legislation. Puerto Rico, in enacting PRWACA, has taken advantage of this delegation of power. We are bound to enforce this statutory scheme.

III.

To summarize:

We hold that the district court was correct in holding that there was no genuine issue of material fact as to the location of the tug at the time of the accident and in finding that the tug was between four and six miles from the Puerto Rican coastline when the accident

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1. The United States in its amicus brief suggests that an affirmance of the district court's judgment will wreak havoc with this country's international relations. This argument seems to be premised on the notion that our decision will have some effect on the boundaries of Puerto Rico's territorial waters. As must be obvious from our holding, we express no opinion on the extent of Puerto Rico's territorial waters with relation to the rights of other countries. Especially, nothing herein is to be taken as diminishing the rights of the United States in the questioned waters with respect to international relations, national defense, or control over the transit of its own or foreign vessels. Our holding concerns only the extent to which Puerto Rico may dictate the exclusive remedy for *its residents* who sustain injury within three marine leagues of its coastline. *Cf. United States v. Louisiana*, 363 U.S. 1, 32-36 (1960) (Submerged Lands Act's extension of certain states' mineral rights to three marine leagues has no effect on international borders).

occurred. Appellant failed to adduce any probative evidence to overcome appellee's compelling showing of the tug's location.

We also hold that the 1980 amendment to §749 permits Puerto Rico to supplant the Jones Act with PRWACA for covered accidents to resident seamen that occur within three marine leagues of the Puerto Rican coastline. We consistently have held that Congress in §749 and its predecessors gave Puerto Rico the power to displace federal maritime law with respect to such accidents to resident seamen by enacting inconsistent local legislation. The 1980 amendment to §749 simply defined the extent to which this limited grant of jurisdiction could reach, i.e. three marine leagues. Puerto Rico has chosen to make the procedures provided in PRWACA the exclusive remedy for covered employees allegedly injured by their insured employers. It is those procedures, not the federal court, to which appellant must look for redress.

Affirmed.

OPINION AND ORDER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civil No. 84-0967(PG)

NARCISO RAFAEL PEREZ DE LA CRUZ, ARDENELY DE JESUS ROJAS CABRERA

Plaintiffs,

v.

CROWLEY TOWING & TRANSPORTATION COMPANY

Defendant.

This is a personal injury action brought by a seaman and his wife for injuries alleged to have been caused by the negligence of the seaman's employer, defendant Crowley Towing & Transportation Co., and due to the alleged unseaworthiness of defendant's tug, the PAWNEE. Recovery is sought under the Jones Act, 46 U.S.C. Sec. 688, and the general maritime law.

The uncontested facts show that on September 19, 1983, plaintiff was an employee of the defendant on board the tug PAWNEE. On that day, while in the service of the tug, which was en route to San Juan, Puerto Rico, plaintiff allegedly fell and injured himself.

The matter is presently before the Court on defendant's Motion for Summary Judgment. In its motion, defendant requests dismissal of the action on the grounds that it (an entity with a Puerto Rico base of operations) is an insured employer under the Puerto Rico Workmen's Accident Compensation Act ("PRWACA"), 11

L.P.R.A. Sec. 1-42; and that plaintiff, a Puerto Rico resident, suffered the alleged injury within the jurisdiction of Puerto Rico territorial waters and, therefore, plaintiff is limited to the remedies available under the PRWACA. *See Lusson v. Carter,* 704 F.2d 646 (1st Cir. 1983).

Plaintiff has opposed this motion stating that there is a genuine issue of material fact as to where the accident occurred, and that, as a matter of law, Puerto Rico's territorial jurisdiction is less than what defendant contends.

The bifurcated nature of the legal standard under Rule 56 of the Federal Rules of Civil Procedure is well established. *Del Valle v. Marine Transport Lines, Inc.,* 582 F. Supp. 573 (D.P.R. 1984). A party opposing a motion for summary judgment must establish that an issue of fact exists which is both material and genuine. *Hahn v. Sargent,* 523 F.2d 461 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976); *Maiorana v. McDonald,* 596 F.2d 1072 (1st Cir. 1979); *Salgado v. Piedmont Capital Corp.* 534 F.Supp. 938 (D.P.R. 1981). Under this rule, a court shall enter judgment "(f)orthwith it the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that (1) there is no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law." *Hahn,* 523 F.2d at 464. If after an extensive review of the record, a court concludes that the facts upon which the nonmoving party relies to support his allegations are not "(s)usceptible of the interpretation which he sought to give them," then the moving party has met his burden of showing the absence of any genuine issue of material fact. *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir. 1985) (citing *Manego v. Cape Cod Five Cents Savings Bank,* 692 F.2d 174 (1st Cir. 1982)). The evidence garnered through discovery and made part of the present record, establishes that no such genuine issue of material fact exists which could defeat defendant's Motion for Summary Judgment.

Although the tug's position at the time of the alleged incident is a material fact, no *genuine* issue as to its position exists. The tug's log book puts the PAWNEE at 6.0 miles off Puerto Rico (Punta Borinquen) at 7:30 a.m. on the day of the alleged accident, September 19, 1983, and 4.0 miles off the coast (Arecibo) at 11:00 a.m. on that same day. A notation in the log was made that the seaman claimed he fell at 9:00 a.m. In addition to the log book, defendant has submitted an affidavit by the tug's captain, Ricardo Villanueva, that the tug was never more than 6.0 miles off Puerto Rico's coast after 7:30 a.m. on that day. Defendant has also submitted an affidavit by Captain Raul Iglesias confirming the tug's location as within 6.0 miles off Puerto Rico at the time of the alleged incident based upon positions taken by radar.

The only opposition that plaintiff can muster to counter defendant's documented and sworn evidence in his own guess of the tug's position at the time of his fall and his further indication to the effect that the accident occurred on the "high seas." During his deposition, plaintiff claimed that he casually glanced at the coastline, at the time of his fall, and guessed or estimated that the PAWNEE was "20, 25 miles from San Juan, something like that."[1] In his deposition, however, plaintiff *agreed* that plotting the course (as Captain Villanueva had done at Punta Borinquen) was a more accurate way to determine the exact position of the vessel. He further made clear that he has never taken a course in or studied navigation, and that as an ordinary seaman, he was not navigating the vessel at the time of the accident. Finally, he has submitted no affidavit to challenge the affidavits of Captains Villanueva and Iglesias, the validity of the log book, nor defendant's sworn answers to interrogatories that the reference to "high seas" contained in the accident report was anything more than a transcription of the seaman's own account of the accident.

Upon the present record, plaintiff's assertions as to the position of the tug cannot be taken for anything more than speculation.

Sheer speculation cannot defeat a motion for summary judgment. *American Insurance Co. v. Vessel SS FORTALEZA*, 585 F.2d 22 (1st Cir. 1978); *Del Valle v. Marine Transport Lines, Inc.*, 582 F.Supp. 573, 78-79 (D.P.R. 1984). "(W)hile (plaintiff is) entitled to all favorable reasonable inferences supported by the record, (he is) not entitled to build (a) case on the gossamer threads of whimsy, speculation and conjecture." *Manganaro v. Delaval Separation Co.*, 309 F.2d 389, 393 (1st Cir. 1962) (quoted in *White v. Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1982)).

Rule 56(e) of the Federal Rules of Civil Procedure requires that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth especific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

A party opposing a motion for summary judgment may not simply cross its arms and assert that a genuine issue exists without submitting evidence to support its claim. *Lusson v. Carter*, 704 F.2d at 649-50.

Plaintiff has completely failed in his duty to refute defendant's evidence with evidence to the contrary which could raise a genuine question of fact for the jury. Given the record before us, reasonable minds could not differ that the PAWNEE was within 6.0 miles of Puerto Rico, at the time of the alleged accident.

Plaintiff's second contention is a purely legal one. He contends that even if the accident occurred six miles off the coast of Puerto

Rico, defendant is still not entitled to summary judgment because Puerto Rico's territorial jurisdiction extends only three miles. Defendant contends that pursuant to the terms of 48 U.S.C. Sec. 749, as amended on March 12, 1980, the territorial jurisdiction of Puerto Rico extends to three marine leagues, or about 10.38 miles.[2]

Section 749 reads as follows:

> Harbors and navigable waters transferred; definitions
>
> *The harbor areas* and navigable streams and *bodies of water* and submerged lands underlying the same *in and around the island of Puerto Rico and the adjacent islands and waters,* owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, *are placed under the control of the government of Puerto Rico,* to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing in this chapter contained shall be construed so as to affect or impair in any manne the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917. Notwithstanding any other provision of

law, as used in this section (1) "submerged lands underlying navigable bodies of water" include lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide, all lands underlying the navigable bodies of water in and around the island of Puerto Rico and the adjacent islands, and all artificially made, filled in, or reclaimed lands which formerly were lands beneath navigable bodies of water; (2) "*navigable bodies of water* and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters" *extend from the coastline of the island of Puerto Rico and the adjacent islands* as heretofore or hereafter modified by accretion, erosion, or reliction, *seaward to a distance of three marine leagues*; (3) "control" includes all right, title, and interest in and to and jurisdiction and authority over the submerged lands underlying the harbor areas and navigable streams and bodies of water in and around the island of Puerto Rico and the adjacent islands and waters, and the natural resources underlying such submerged lands and waters, and includes proprietary rights of ownership, and the rights of management, administration, leasing, use, and development of such natural resources and submerged lands beneath such waters. (Emphasis added.)

The plaintiff argues that the "three marine leagues" jurisdiction in this statute refers only to "submerged lands." The defendant contends that it also applies to navigable bodies of water. Each party cites different portions of the legislative history of the 1980 amendment to sustain their respective positions.

After having carefully reviewed the arguments and authorities cited by both parties, we think it is clear from the plain language of the statute that it covers navigable bodies of waters *as well as* the submerged lands surrouding Puerto Rico. It is a principal rule of legislative interpretation that when a statute is clear and unambiguous, and in the absence of "(a) clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Rusello v. United States,* 464 U.S. 16, 20 (1983); *United States v. Turkette,* 452 U.S. 576, 580 (1981); *Consumer Product Safety Commission v. GTE Sylvania Corp.,* 447 U.S. 102, 108 (1980).

In the present case, the statute we are dealing with explicitly joins the phrases "navigable bodies of waters," and "submerged lands" with the conjunction "and." The plain language of the statute, therefore, clearly supports defendant's position. The legislative intent is clearly not to the contrary. Although it does indicate that Congress was interested in protecting Puerto Rico's interest in mineral rights, there is nothing to indicate that, in seeking to protect this interest, Congress did not intend to include an extension in the jurisdiction over navigable waters in addition to an extension with respect to submerged lands. Congress had drafted a statute limited to submerged lands. *Cf.* 43 U.S.C. Sec. 1301 (United States relinquishes right title and interest in "lands beneath navigable waters"). The statute in question specifically includes navigable waters. Thus, we cannot read the statute in the limited way which the plaintiff suggests.

In summary, the record establishes that plaintiff's accident occurred within six miles of the coast of Puerto Rico. In order for the plaintiff's remedy to be under the PRWACA, his employer must insure his employees under the Act. Since defendant has complied with the terms of PRWACA and since the accident occurred within the territorial jurisdiction of Puerto Rico, plaintiff's remedy is

governed by the terms of the PRWACA and this action must be, and is hereby, dismissed.

WHEREFORE, in view of the above, the Court hereby GRANTS defendant's Motion for Summary Judgment. The Clerk of the Court shall enter summary judgment dismissing the Complaint.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 16th, 1986.

s/ Juan M. Perez-Gimenez
Chief U.S. District Judge

No. 86-1551

In the Supreme Court of the United States

OCTOBER TERM, 1986

NARCISO RAFAEL PEREZ DE LA CRUZ, et ano.,
PETITIONER,

v.

CROWLEY TOWING & TRANSPORTATION CO.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Statement of the Case

The petitioner is a resident of Puerto Rico who served as a seaman aboard the tugboat PAWNEE, which at the time in question operated out of San Juan Harbor. The respondent was the operator of the tugboat and the petitioner's employer.[1] As an employer it had a fully insured status with the Puerto Rico State Insurance Fund under the terms of the Puerto Rico Workmen's Accident Compensation Act ("PRWACA"), 11 P.R. Laws Ann. §§ 1-42.

[1] Pursuant to Supreme Court Rule 28.1, it is stated that the respondent, Crowley Towing and Transportation Company, is a wholly-owned subsidiary of Crowley Maritime Corporation.

On September 19, 1983 the petitioner suffered an accident aboard the tugboat when he fell on a ladder. Subsequently he filed suit against the employer (tugboat operator) to recover damages for injuries sustained from the fall. It is now undisputed that the accident occurred approximately six miles off the coast of Puerto Rico.

The employer (tugboat operator) moved to dismiss the complaint for, among other reasons, employer immunity under the Puerto Rico workmen's compensation statutory scheme. The petitioner-seaman opposed the motion contending the accident had occurred outside of the jurisdiction of the Commonwealth of Puerto Rico, and thus its local laws were not applicable to the accident. The petitioner argued that once outside of Puerto Rico his remedy was a federal one under the Jones Act, 46 U.S.C. §688, and the general maritime law, and not under the benefits provided by the local workmen's compensation laws.

The petitioner (seaman) sustained the position that the laws of Puerto Rico had an application only up to three miles from its coast. The respondent (employer) held the position that the laws of Puerto Rico were applicable seaward to a distance of three marine leagues (10.38 miles).

The question of what law was applicable, federal or Puerto Rico, turned upon the interpretation of 48 U.S.C. §749 (Section 8 of the Puerto Rican Federal Relations Act). This section provides in its pertinent part:

> The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico..., be, and are hereby, placed under the control of the government of Puerto Rico...
>
> (2) 'navigable bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters' extend from the coastline of the island of Puerto Rico..., seaward to a distance of three marine leagues....

The petitioner contended that the correct interpretation of this section limited it exclusively to matters concerning mineral resources. The respondent argued that this section of the Federal Relations Act applied to all areas of Puerto Rico law and the application of the same to the surrounding waters.

The district court accepted the position of the respondent and dismissed the complaint on a motion for summary judgment. The Court of Appeals for the First Circuit, after receiving argument from the United States and the Commonwealth of Puerto Rico as amicus curiae, affirmed. The decision is reported at 807 F.2d 1084 (1st Cir. 1986).

Reasons for Denying the Writ

The petitioner sets forth two questions presented for review. The first concerns the question of Congress' intent in enacting the amendment to section 749 which speaks of a seaward extension of three marine leagues. The second concerns a supposed conflict between section 749 and the foreign policy position of the United States and its territorial sea.

Neither question presented is important enough to warrant the granting of a writ of certiorari.

I. This Case Concerns a Statute Which Is Clear and Unequivocal on Its Face

Both the district court and the Court of Appeals expressly held that section 749 was clear "on its face" as extending Puerto Rico's seaward jurisdiction three marine leagues seaward (10.38 miles). 807 F.2d at 1087. In arguing in favor of granting the writ the petitioner sustains, by quoting selected excerpts from the Congressional material, that the Court of Appeals committed error in not accepting the primary purpose of the amendment. But the opinion of the Court of Appeals for the First Circuit is clear that it did review the legislative history and that this material did not compel a limited interpretation of section 749. The Court stated:

> While we agree that most of the legislative history concerning the amendment suggests that Congress' major purpose in amending §749 was to give Puerto Rico the same rights to undersea minerals as certain coastal states were given by the Submerged Lands Act, 43 U.S.C. §1301 (1953), the legislative history expresses no intent to limit the plain language of the amendment which gives Puerto Rico control over the navigable waters within three marine leagues of the coastline.

The Court of Appeals' decision is neither contrary to any judicial interpretation of section 749, and its analysis violates none of the accepted rules of statutory interpretation. The lower courts simply read the statute, applied its plain meaning, and found nothing in the legislative history which otherwise clearly contradicted its plain meaning.

II. The Decision of the Court of Appeals Does Not Affect U.S. Foreign Relations

This action involved a Puerto Rico domicile suing a Puerto Rico-based employer. The Court of Appeals held that in such a situation, and within three marine leagues seaward from the coast of Puerto Rico, the Commonwealth's workmen's compensation statutes were applicable. Although the petitioner attempts to implicate questions of sovereignty and international relations, this case simply has nothing to do with either. It deals solely with a limited domestic concern of Puerto Rico and the application of Puerto Rico law to its residents. As the Court of Appeals stated (807 F.2d at 1088, fn. 2) in precise terms:

> The United States in its amicus brief suggests that an affirmance of the district court's judgment will wreak havoc with this country's international relations. This argument seems to be premised on the notion that our decision will have some effect on the boundaries of Puerto

> Rico's territorial waters. As must be obvious from our holding, we express no opinion on the extent of Puerto Rico's territorial waters with relation to the rights of other countries. Especially, nothing herein is to be taken as diminishing the rights of the United States in the questioned waters with respect to international relations, national defense, or control over the transit of its own or foreign vessels. Our holding concerns only the extent to which Puerto Rico may dictate the exclusive remedy for its residents who sustain injury within three marine leagues of its coastline. *Cf. United States* v. *Louisiana*, 363 U.S. 1, 32-36 (1960) (Submerged Land Act's extension of certain states' mineral rights to three marine leagues has no effect on international borders.

This case, therefore, also has nothing to do with, and does not in any way affect, the three mile territorial sea of the United States.

Conclusion

The present case presents no issue of consequence with respect to section 749, or to concepts of judicial interpretation. The case also presents a very limited lower court holding which does not in any way implicate, much less endanger, this Nation's international relations.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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